Mohd Nadzri bin Azhari v Mohd Amar bin Mohajin & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–401–12 OF 2021
AMARJEET SINGH J
11 SEPTEMBER 2023

Public servants — Dismissal — Dismissal of police officer — Whether dismissal was made in accordance with law — Whether court would not interfere with decision of disciplinary authority unless there was a fundamental procedural flaw

The applicant, a police corporal, was charged together with several other officers in the magistrate's court with causing two detainees under their supervision and custody in a police station lockup to escape from detention, an offence under s 221(a) of the Penal Code. The incident caused the applicant to be interdicted under s 78(1) of the Police Act 1967 and even though he was subsequently granted a discharge not amounting to an acquittal ('DNAA') on the criminal charge by the court, disciplinary proceedings for insubordination under reg 4(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') were commenced against him. After considering the applicant's defence to five disciplinary charges, the disciplinary authority found him guilty and dismissed him from service ('the decision'). In the instant judicial review application, the applicant sought to, inter alia, quash the decision and be reinstated to the police force without any loss in rank or loss of opportunity for promotion and to be paid all arrears of salary, allowances and emoluments that were due to him. The application was premised on the grounds that, inter alia, the disciplinary authority had: (a) wrongly used the 1993 Regulations for the disciplinary proceedings instead of using the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 ('the 2002 Amendment Regulations'); (b) failed to consider regs 30 and 31 of the 2002 Amendment Regulations which stated that when criminal proceedings had been commenced, no disciplinary action could be taken against the officer concerned based on the same facts as the criminal charge; (c) failed to consider reg 28(7) of the 2002 Amendment Regulations which said that when criminal proceedings had ended in an acquittal, the public officer had the right to be reinstated to his original position and be paid whatever monies were due to him; and (d) failed to properly consider the applicant's written representations in respect of the charges. The applicant also contended that the decision contravened arts 5, 7(2), 8, 135(2), 140 and 144 of the Federal Constitution and that the charges against him were condoned when the former deputy police chief asked him to rejoin the police force.

Held, dismissing the judicial review application:

(1) The submission that the wrong disciplinary regulations had been used in the applicant's case was misconceived and devoid of merit. The 2002 Amendment Regulations merely amended the 1993 Regulations which remained as the 'principal regulations' under which the disciplinary proceedings were taken. Any amending regulation that was enacted to amend the 1993 Regulations would, upon coming into force, become part of and be construed as one with the 1993 Regulations (see para 12).

(2) The applicant's submission on reg 28(7) of the 1993 Regulations was not relevant on the facts and had no merit. Regulation 28(7) did not prohibit the institution of disciplinary proceedings after a DNAA had been granted. This was clear from regs 30 and 31 which allowed disciplinary proceedings to be instituted even where criminal proceedings were still pending against an officer, subject of course to the limitations imposed therein. In the instant case, after the DNAA was granted, the applicant remained interdicted pending the institution of disciplinary proceedings and such proceedings were, in fact, commenced (see paras 29 & 31–32).

(3) The grounds for the disciplinary charges against the appellant were totally different from the grounds of the criminal charge against him. The criminal charge against the applicant and his co-accused was for deliberately causing two detainees in the lock-up under their supervision to escape or attempt to escape from detention. Whereas, the first disciplinary charge against the applicant — on which he was dismissed from service — was for taking out three suspects detained in the lockup without the permission of his superior officers in breach of para 29 of the standard operating procedures of the lockup management. This was an act of insubordination amounting to a disciplinary offence. The disciplinary charges had satisfied the conditions of regs 30 and 31 and were valid and lawful as they were based on different grounds altogether from the criminal charge and arose out of the applicant's conduct in the performance of his duties. The disciplinary charges did not raise substantially the same issues as those in the criminal proceedings (see paras 34–38).

(4) Article 7(2) of the Federal Constitution was not contravened in the present case as the applicant was not acquitted by the magistrate's court. The meaning attributed to the word 'acquitted' in reg 28 (which included a DNAA) did not apply to the word 'acquitted' in art 7(2) (see para 40).

(5) There was no condonation of the applicant's acts of insubordination either actively or passively. There was no evidence to show that he had been pardoned from the disciplinary charges. The fact that despite the DNAA, the interdiction order against the applicant was maintained and disciplinary proceedings were commenced with showed that the applicant was not forgiven for the criminal charge and/or the disciplinary charges (see paras 42–43).

(6) The applicant was interdicted pursuant to s 78 of the Police Act 1967 read with reg 44 of the 1993 Regulations. Interdiction had an effect on an officer's emoluments and allowances pending the disposal of criminal charges and/or disciplinary charges. If the officer was convicted of the criminal charge or dismissed from service, he was not entitled to any part of the emoluments that was not paid to him during the period of his interdiction. As the applicant was dismissed from service, his complaint with regard to the emoluments and allowances had no merit (see paras 48–49).

(7) After reviewing the decision for process and substance, the court found no reason to interfere with the disciplinary authority's finding of guilt on all the disciplinary charges against the applicant (see para 52).

[Bahasa Malaysia summary

Pemohon adalah koperal polis yang dituduh bersama beberapa pegawai lain di mahkamah majistret kerana menyebabkan dua tahanan di bawah pengawasan dan jagaan mereka berada di dalam lokap balai polis melepaskan diri dari tahanan, yang mana ianya satu kesalahan di bawah s 221(a) Kanun Keseksaan. Kejadian itu menyebabkan pemohon dituduh di bawah s 78(1) Akta Polis 1967 dan walaupun beliau kemudiannya dilepaskan tanpa dibebaskan ('DNAA') oleh mahkamah, prosiding tatatertib kerana keingkaran di bawah Per 4(2) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993') telah dimulakan terhadapnya. Selepas mempertimbangkan pembelaan pemohon kepada lima pertuduhan tatatertib, lembaga tatatertib mendapati dia bersalah dan memecatnya daripada perkhidmatan ('keputusan tersebut'). Dalam permohonan semakan kehakiman ini, pemohon memohon, antara lain, membatalkan keputusan itu dan dikembalikan semula kepada pasukan polis tanpa sebarang kehilangan pangkat atau kehilangan peluang untuk kenaikan pangkat dan dibayar semua tunggakan gaji, elaun dan emolumen yang disebabkan pemecatan tersebut. Permohonan itu berdasarkan alasan bahawa, antara lain, lembaga tatatertib telah: (a) salah menggunakan Peraturan-Peraturan 1993 untuk prosiding tatatertib dan bukannya menggunakan Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Pindaan) 2002 ('Peraturan-Peraturan Pindaan 2002'); (b) gagal mempertimbangkan peraturan 30 dan 31 Peraturan-Peraturan Pindaan 2002 yang menyatakan bahawa apabila prosiding jenayah telah dimulakan, tiada tindakan tatatertib boleh diambil terhadap pegawai berkenaan berdasarkan fakta yang sama seperti pertuduhan jenayah; (c) gagal mempertimbangkan peraturan 28(7) Peraturan-Peraturan Pindaan 2002 yang mengatakan bahawa apabila prosiding jenayah telah berakhir dengan pembebasan, pegawai awam mempunyai hak untuk dikembalikan semula ke jawatan asalnya dan dibayar sebarang wang yang perlu dibayar kepadanya; dan (d) gagal mempertimbangkan dengan betul representasi bertulis pemohon berkenaan tuduhan itu. Pemohon juga berhujah

bahawa keputusan itu melanggar perkara 5, 7(2), 8, 135(2), 140 dan 144 Perlembagaan Persekutuan dan pertuduhan terhadapnya telah dilepaskan apabila bekas Timbalan Ketua Polis Negara itu meminta beliau menyertai semula pasukan polis.

Diputuskan, menolak permohonan semakan kehakiman:

(1) Hujahan bahawa peraturan-peraturan tatatertib yang salah telah digunakan dalam kes ini adalah salah dan tidak mempunyai merit. Peraturan-Peraturan Pindaan 2002 hanya meminda Peraturan-Peraturan 1993 yang kekal sebagai 'peraturan utama' di mana prosiding tatatertib diambil. Sebarang pindaan peraturan yang telah digubal untuk meminda Peraturan-Peraturan 1993 akan, apabila mula berkuat kuasa, menjadi sebahagian darinya dan ditafsirkan sekali dengan Peraturan-Peraturan 1993 (lihat perenggan 12).

(2) Hujahan pemohon mengenai peraturan 28(7) Peraturan-Peraturan 1993 adalah tidak relevan dengan fakta dan tidak mempunyai merit. Peraturan 28(7) tidak melarang institusi prosiding tatatertib selepas DNAA diberikan. Hal ini jelas apabila peraturan 30 dan 31 membolehkan prosiding tatatertib dimulakan walaupun prosiding jenayah masih belum selesai terhadap seorang pegawai, tertakluk kepada batasan yang dikenakan. Dalam kes ini, selepas DNAA diberikan, pemohon masih ditahan kerja sementara menunggu prosiding tatatertib dan prosiding itu sudah pun bermula (lihat perenggan 29 & 31–32).

(3) Alasan-alasan bagi pertuduhan tatatertib terhadap perayu adalah berbeza dengan alasan-alasan pertuduhan jenayah terhadapnya. Pertuduhan jenayah terhadap pemohon dan tertuduh yang lain adalah kerana dengan sengaja menyebabkan dua tahanan di dalam lokap di bawah jagaan mereka melarikan diri atau cuba melarikan diri daripada tahanan. Manakala, pertuduhan tatatertib pertama terhadap pemohon — di mana dia dipecat dari perkhidmatan — adalah kerana mengambil tiga suspek yang ditahan di lokap tanpa kebenaran pegawai atasannya yang melanggar perenggan 29 prosedur operasi standard pengurusan lokap. Hal ini merupakan satu tindakan keingkaran yang menjurus kepada kesalahan tatatertib. Pertuduhan-pertuduhan tatatertib itu telah memenuhi syarat-syarat di dalam peraturan 30 dan 31 dan sah kerana ianya berbeza dengan pertuduhan jenayah yang timbul daripada tindakan pemohon dalam melaksanakan tugasnya. Pertuduhan-pertuduhan tatatertib itu tidak menimbulkan isu yang sama seperti yang terdapat di dalam prosiding jenayah (lihat perenggan 34–38).

(4) Kes ini tidak menyalahi perkara 7(2) Perlembagaan Persekutuan kerana pemohon tidak dibebaskan oleh mahkamah majistret. Maksud perkataan 'dibebaskan' di dalam peraturan 28 (termasuk DNAA) tidak

terpakai kepada perkataan 'dibebaskan' menurut perkara 7(2) (lihat perenggan 40).

(5) Tiada pelepasan terhadap tindakan keingkaran pemohon sama ada secara aktif atau pasif. Tiada keterangan yang menunjukkan bahawa dia telah dilepaskan daripada tuduhan tatatertib. Fakta bahawa DNAA telah diberikan, perintah tahanan kerja terhadap pemohon dikekalkan dan prosiding tatatertib dimulakan dengan menunjukkan bahawa pemohon tidak dilepaskan atas pertuduhan jenayah dan/atau pertuduhan tatatertib (lihat perenggan 42–43).

(6) Pemohon telah ditahan kerja menurut s 78 Akta Polis 1967 dibaca bersama per 44 Peraturan-Peraturan Polis 1993. Penahanan kerja mempunyai kesan ke atas emolumen dan elaun pegawai sementara menunggu pelupusan pertuduhan jenayah dan/atau pertuduhan tatatertib. Sekiranya pegawai itu disabitkan dengan pertuduhan jenayah atau dipecat dari perkhidmatan, dia tidak berhak mendapat mana-mana bahagian emolumen yang tidak dibayar kepadanya semasa tempoh tahanan kerja. Oleh kerana pemohon diberhentikan daripada perkhidmatan, tuntutannya berkenaan emolumen dan elaun tidak mempunyai merit (lihat perenggan 48–49).

(7) Selepas meneliti keputusan proses dan alasan-alasan, mahkamah mendapati tiada sebab untuk mengganggu dapatan pihak berkuasa tatatertib bersalah atas semua pertuduhan tatatertib terhadap pemohon (lihat perenggan 52).]

Cases referred to

Dato' Seri Hj Mustafar bin Hj Ali (Chairman of the Disciplinary Board for the Support Group (No 1), Immigration Department of Malaysia, Putrajaya) & Ors v Yuganthiran a/l Guinda Rajoo [2023] 2 MLJ 255; [2023] 3 CLJ 693, CA (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Khalid bin Mat v Suruhanjaya Pasukan Polis Diraja Malaysia & Ors [2011] MLJU 723; [2011] 7 CLJ 613, HC (folld)

Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor [2021] 6 MLJ 750; [2021] 10 CLJ 737, CA (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1, FC (refd)

Legislation referred to

Federal Constitution arts 5, 7(2), 8, 132(2), 135(2), 140, 144
Penal Code ss 34, 221, 221(a)
Police Act 1967 s 78, 78(1)

Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2), (2)(i), (2)(ii), 10(3), 28, 28(1), (2), (3), (4), (5), (6), (7), (11), 29, 30, 30(1), (2), 31, 31(1), (2), 38, 43(1), 44, 54(1), Part IV
Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (repealed by Public Officers (Conduct and Discipline) Regulations 1993)
Rules of Court 2012 O 53

M Manoharan (with Anis Salihah bt Abdul Malek) (M Manoharan & Co) for the applicant.
Nur Idayu bt Amir (Senior Federal Counsel, Attorney General's Chamber) for the respondents.

Amarjeet Singh J:

INTRODUCTION

[1] The applicant, Mohd Nadzri bin Azhari, was dismissed from the police force on the first disciplinary charge in a disciplinary proceeding with effect from 26 August 2021. He filed the instant judicial review proceedings on 16 December 2021 principally for an order of certiorari to quash the decision made by the disciplinary authority ('second respondent') stated in letter dated 2 September 2021 ('the impugned decision').

[2] Apart from the order of certiorari, the applicant also sought the following consequential orders:

(a) reinstatement in the police force without any loss in rank or loss of opportunity for promotion;

(b) be paid all the salaries, allowances and emoluments due to him;

(c) be paid all emoluments and allowances taken away when during the period he was interdicted;

(d) an order that general damages, aggravated damages and exemplary damages be assessed by this court; and

(e) interest and costs.

[3] On 26 June 2023, I dismissed the application.

BACKGROUND

[4] The applicant at the time of his dismissal was on duty as Koperal Balai Polis Komuniti Queensbay (3), Balai Polis Bayan Baru, Ibu Pejabat Polis Daerah Barat Daya, Pulau Pinang. On 9 July 2017 there was a report lodged on

suspects who were in the lockup missing. The applicant and six other police officers were arrested to assist in the investigation that ensued. On 14 July 2017, the applicant was interdicted pursuant to s 78(1) of the Police Act 1967 and subsequently on 10 July 2018 charged at the magistrate's court for an offence under para (a) of s 221 read with s 34 of the Penal Code.

[5] On 15 May 2019, the magistrate court made an order of discharged not amounting to an acquittal ('DNAA') on the charge faced by the applicant and his co-accused. Thereafter, the Jabatan Integriti dan Pematuhan Standard of the police force carried out an investigation on a complaint of misconduct in breach of reg 4(2) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations').

[6] The applicant received a letter dated 2 October 2020 informing him of the decision made by the second respondent to commence disciplinary action against him with the view of dismissal or reduction in rank pursuant to the 1993 Regulations on five charges. In the letter the applicant was given an opportunity to make representations in writing to exculpate himself within the stipulated statutory time ie within 21 days from the date of receipt of the show cause letter.

[7] The applicant had asked for and was given: (a) an extension of time to furnish his written representations; and (b) the documents he requested from the second respondent to assist him prepare his written representations. It suffices to say that all documents requested for by the applicant were furnished to him. The complaint of not being furnished documents was therefore baseless. The applicant submitted his written representations in a letter dated 13 November 2020.

[8] The applicant was informed in a letter dated 2 September 2021 that he was found guilty on all five charges. The punishment for the first disciplinary charge was 'dismissal' while the punishment in respect of the second, third, fourth and fifth disciplinary charges was a 'warning' respectively. The disciplinary procedures and the right to be heard prescribed by the 1993 Regulations were strictly followed by the disciplinary authority.

GROUNDS FOR JUDICIAL REVIEW

[9] The grounds of review raised in the O 53 statement in support of the application can be summarised as follows:

(a) the disciplinary authority committed an error of law in using the wrong regulations in carrying out the disciplinary proceedings. The Public

Officers (Conduct and Discipline) (Amendment) Regulations 2002 ('the 2002 Amendment Regulations') ought to have been used instead of the 1993 Regulations;

(b) the disciplinary authority failed to consider regs 30 and 31 of the 2002 Amendment Regulations when making the impugned decision ie when criminal proceedings have been commenced against the officer then no disciplinary action can be taken based on the same facts as the criminal charge;

(c) the disciplinary authority failed to consider reg 28(7) of the 2002 Amendment Regulations, in that, when criminal proceedings have concluded in an acquittal the public officer has a right to be reinstated to his original position and paid whatever monies due to that officer;

(d) the decision is tainted with illegality for being in contravention of arts 5, 7(2), 8, 135(2), 140 and 144 of the Federal Constitution;

(e) there was condonation as the applicant was asked to rejoin the police force by the former Deputy Chief of Police sometime in December 2019;

(f) the disciplinary authority failed to consider the written representations of the applicant and this act amounted to a denial of natural justice and a breach of the 'wednesbury unreasonablness' principles;

(g) there was a failure to consider the written representations on the second, third, fourth and fifth charges and the charges were defective as it ought to have been under reg 4(2)(i) and not reg 4(2)(ii) of the 1993 Regulations; and

(h) the act of issuing the interdiction order was in breach of reg 43(1) of the 2002 Amendment Regulations as it exceeded two years.

DECISION OF THE COURT

[10] The applicant, during oral submissions, focussed primarily on the grounds of wrong regulations being used and the failure to comply with sub-reg 28(7) of the 2002 Amendment Regulations and stood by the other grounds submitted in the written submissions filed in Judicial Review Application No WA-25–395–12 of 2021.

The appropriate disciplinary regulations against public officers

[11] The Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 or the 2002 Regulations came into operation on 20 June 2002. The applicant submitted that these were the correct regulations to use and not the 1993 Regulations ie the Public Officers (Conduct and Discipline)

Regulations 1993. It was submitted that the use of the wrong regulations rendered the entire disciplinary proceedings null and void.

[12] The submission is devoid of merit for the reason that there was a failure to appreciate the nature of 'principal regulations' and how to construe an 'amending regulation' which amends that principal regulations. The contents of the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 clearly state that it is an 'amending regulation' and was enacted for the purpose of amending the principal regulations which is the 1993 Regulations.

[13] The 1993 Regulations were made by the Yang di-Pertuan Agong under art 132(2) of the Federal Constitution. It governs the conduct and discipline of public officers and came into effect on 15 December 1993 after one of its provisions, reg 54(1), repealed the then existing General Orders which governed the conduct and discipline of public officers ie the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980. Regulation 54(1) of the 1993 Regulations which is the ('repeal and saving' clause provided as follows:

> The Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, hereinafter referred to as 'the repealed General Orders', are hereby repealed,

[14] In this regard reg 2 of the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 provide as follows:

> The Public Officers (Conduct and Discipline Regulations 1993 [P.U. (A) 395/1993], which in these Regulations are referred to as the 'principal Regulations', are amended in regulation 2 by deleting subregulation 2(2).

[15] Since coming into force, there have been altogether eight amending regulations that have amended the 1993 Regulations either by way of 'deletion' or 'substitution' or 'insertion' or 'replacement'. The other seven amending regulations, apart from the 2002 Amendment Regulations, are:

(a) Public Officers (Conduct and Discipline) (Amendment) Regulations 1995;

(b) Public Officers (Conduct and Discipline) (Amendment) Regulations 1996;

(c) Public Officers (Conduct and Discipline) (Amendment) Regulations 2006;

(d) Public Officers (Conduct and Discipline) (Amendment) Regulations 2007;

(e) Public Officers (Conduct and Discipline) (Amendment) Regulations 2010;

(f) Public Officers (Conduct and Discipline) (Amendment) Regulations 2011; and

(g) Public Officers (Conduct and Discipline) (Amendment) Regulations 2015.

[16] An identical submission arose in the case of *Khalid bin Mat v Suruhanjaya Pasukan Polis Diraja Malaysia & Ors* [2011] MLJU 723; [2011] 7 CLJ 613 where Aziah Ali J (as Her Ladyship then was) held as follows:

> The Public Officers (Conduct and Discipline) (Amendment) Regulations 2002, as its name indicates, is an amending law. The purpose of an amending law is to amend existing legislation. Amending laws describe changes in a particular existing principal law. Hence in s 2 of the 2002 Regulations, the 1993 Regulations is referred to the as the 'principal Regulations'. Vide the 2002 Regulations new provisions were introduced and various provisions then existing in the 1993 Regulations were substituted with new provisions. For example, s 8 of the 2002 Regulations substituted the existing Part V of the 1993 Regulations with a new Part V.
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> The Interpretation Acts 1948 and 1967 (Act 388) provides vide s 90 as follows:
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> > Where regulations amend other regulations, the amending regulations shall, so far as is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended regulations.
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> Hence with effect from 20 June 2002, the date the amendments came into force, the new provisions introduce vide the 2002 Regulations (the amending regulations) form part of and is to be construed as one with the 1993 Regulations (the amended regulations). The 1993 Regulations is still in force and remains as the only regulations governing the conduct and discipline of public servants until such time it is repealed. Therefore, it is a misconception to treat the 2002 Regulations as substituting the 1993 Regulations. Consequently, the submissions that the disciplinary board did not apply the correct law and had acted mechanically is without merit, I find that the disciplinary board had not erred in instituting disciplinary action against the applicant under the 1993 Regulations and consequently the charges levelled against him are valid.

[17] I gratefully adopt the same reasoning. Any amending regulation that is enacted to amend the 1993 Regulations will upon coming into force become part of and is to be construed as one with the 1993 Regulations. It is for this reason that the submission of using the wrong regulations is misconceived in law. Accordingly, I hold that ground of review (a) above is devoid of merit.

Grounds concerning regs 28, 30 and 31 and art 7(2)

[18] The submissions by the applicant concerning grounds of review (b), (c) and (d) above clearly overlap with one another and is therefore taken together. The submission was that upon being given a DNAA, the applicant was not

reinstated to his original position in the police force according to sub-reg 28(7) of the 1993 Regulations. The submission is premised on sub-reg 28(11) of the 1993 Regulations which provide that the word 'acquittal' includes a DNAA which means that the applicant has been freed from the charge. Therefore, no disciplinary proceedings can be taken against the applicant on the same charge.

[19] In the alternative, it was submitted that the disciplinary proceedings were unlawful being in violation of sub-reg 30(1) of the 1993 Regulations since the criminal proceedings in the magistrate's court by virtue of the DNAA is merely stayed and not disposed of or completed. Subregulation 30(1) of the 1993 Regulations, it was argued, prohibited disciplinary action being taken on the same ground as the criminal charge when the criminal charge is still pending in the magistrate's court.

[20] As a further alternative, it was submitted that the disciplinary proceedings against the applicant are clearly against art 7(2) of the Federal Constitution subjecting the applicant to double jeopardy of being tried for the same offence twice although the magistrate's court had acquitted the applicant of the same charge.

[21] The respondents submitted there was no breach of regs 28, 30, 31 and art 7(2) of the Federal Constitution as alleged by the applicant.

[22] I agree with the respondents' submission. To appreciate the submissions made it is necessary to begin with that part of the 1993 Regulations which regulates the situation where criminal proceedings have been instituted against an officer. The relevant part is Part IV of the 1993 Regulations which begins with reg 28 (hereinafter all regulations and subregulations refer to the 1993 Regulations unless stated otherwise).

[23] Subregulation 28(1) starts with placing a duty on the officer charged with a criminal offence to inform his head of department that he has been so charged. At the same time the registrar of the court (in which the officer is charged) is by virtue of sub-reg 28(2) under a duty: firstly, to send a report containing the information on the criminal proceedings to the said officer's head of department; and secondly, at the end of the criminal proceedings to inform the said head of department of the decision of the court including whether an appeal has been filed against the decision.

[24] Subregulation 28(3) requires the head of department, upon obtaining such report to forward the same to the disciplinary authority with his recommendation as to whether or not the officer should be interdicted from duty. Subregulation 28(4) confers discretion on the said disciplinary authority whether to interdict the officer based on the said recommendation. Upon

completion of the criminal proceedings, sub-reg 28(5) imposes a duty on the head of department to forward to the said disciplinary authority the decision of the court and information relating to appeals filed by the public prosecutor.

[25] In the case where the officer is convicted, sub-reg 28(6) requires the disciplinary authority to suspend the officer with effect from the date of his conviction pending the decision of the disciplinary authority under reg 29.

[26] In the case where the officer is acquitted and there is no appeal by the public prosecutor, sub-reg 28(7) provides that the officer shall be allowed to resume his duties and be paid all emoluments held from him during his interdiction. But in a situation where the public prosecutor has appealed against the decision, the discipline authority will decide whether the officer should continue to be interdicted until the appeal is determined. Finally, sub-reg 28(11) provides that for the purposes of reg 28 the word 'acquittal' includes a DNAA.

[27] Regulation 29 is not relevant for the purposes of the instant case as it concerns the situation where an officer has been convicted by the court. Regulation 30 provides the conditions when disciplinary action can or cannot be taken against an officer at the time criminal proceedings are still pending against the officer:

(a) disciplinary action cannot be taken on the same grounds as the criminal charge where criminal proceedings are still pending (sub-reg 30(1)); and

(b) disciplinary action can be taken based on any other ground arising out of the officer's conduct in the performance of his duties during the pendency of the said criminal proceedings (sub-reg 30(2)).

[28] Regulation 31 sets out the consequences of an acquittal in criminal proceedings against an officer as follows:

(a) sub-reg 31(1) prohibits the institution of any disciplinary proceedings on the same charge that the officer was acquitted of in the criminal proceedings; and

(b) sub-reg 31(2) states that, notwithstanding sub-reg 31(1), disciplinary proceedings can be taken on any other ground arising out of his conduct in relation to the criminal charge, whether or not connected to the performance of his duties, *as long as the grounds for the disciplinary action do not raise substantially the same issues as those in the criminal proceedings in relation to the criminal charge of which the officer was acquitted*.

[29] I will now address the submissions made by the applicant. First, sub-reg 28(7) is not relevant on the facts and the submission made based on

this sub-reg is devoid of merit. My reasons are as follows. Subregulation 28(7) envisages a situation where the officer is acquitted of the criminal charge and there is no appeal by the public prosecutor — in other words — the officer must resume his duties as the acquittal is final. Likewise, where an acquittal includes a DNAA, as specifically provided by sub-reg 28(11), it is deemed that the DNAA is final and the officer will not be recharged and the officer must resume his duties.

[30] In this regard, it must be remembered that 'acquittal' includes a DNAA only for the purposes of reg 28 and no other provision by the clear words of sub-reg 28(11), *to wit, for the purpose of this regulation, 'acquittal' includes a discharge not amounting to an acquittal*. This means for the other provisions the ordinary meaning and effect of a DNAA applies ie a DNAA in its ordinary meaning does not amount to an acquittal. In case the officer is recharged by the public prosecutor then reg 28 would have to be complied afresh.

[31] The reason why sub-reg 28(11) is enacted is also clear. For otherwise, a lacuna would exist if the deeming provision in sub-reg 28(11) does not exist. The status of an officer who is granted a DNAA and is not recharged would be uncertain. Further and more importantly, sub-reg 28(7) does not prohibit the institution of disciplinary proceedings after a DNAA has been granted. This is clear from regs 30 and 31 which allow disciplinary proceedings to be instituted against the officer even where criminal proceedings are still pending against the officer, subject of course to the limitations imposed therein.

[32] In the instant case, after the DNAA was granted by the court, the applicant remained interdicted pending disciplinary proceedings. The applicant was eventually given a show cause on a charge of breach of discipline which is the subject matter of the instant judicial review application.

[33] The issue before this court was whether the disciplinary proceedings were lawfully instituted against the applicant.

[34] In the instant case, there is a DNAA of the criminal charge and the possibility of being recharged by the public prosecutor cannot be discounted. As such the DNAA is to be treated as an acquittal. I have considered the criminal charge and the disciplinary charges and found them to be on different grounds. My reasons are that for a disciplinary charge to be valid and lawful, the stipulated conditions in regs 30 and 31 must be satisfied.

[35] Regulation 30 read with reg 31 provides that a valid disciplinary charge would be one that is:

(a) based on any other ground, from the ground that made up the criminal charge, arising out of the officer's conduct in the performance of his duties; or

(b) based on any other ground arising out of the officer's conduct in relation to the criminal charge, whether or not connected to the performance of his duties, as long as the grounds for the charge in the disciplinary proceedings do not raise substantially the same issues as those in the criminal charge of which the officer was acquitted.

[36] To determine whether the grounds in the disciplinary charge are on totally different grounds from the criminal charge or do not raise substantially the same issues as those in the criminal charge a comparison of both the disciplinary charge and the criminal charge is necessary. The criminal charge was in the following words:

> Bahawa kamu bersama-sama pada 9 Julai 2017 jam lebih kurang *0230hrs* di *Jalan Paya Terubong*, *di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang,* ialah seorang penjawat awam, iaitu anggota polis, dan sebagai penjawat awam sedemikian *terikat di sisi undang-undang untuk menangkap seorang benama Mohd Affindie bin Jaafar dan Thurairaj a/l Krishnan yang dipertuduh melakukan kesalahan atau disabitkan atas apa-apa kesalahan atau secara sahnya dikehendaki berada dalam jagaan dengan sengaja menyebabkan Mohd Affindie bin Jaafar dan Thurairaj a/l Krishnan itu lari, atau dengan membantu orang itu lari atau mencuba lari dari pengurungan*. Oleh yang demikian, kamu telah melakukan kesalahan di bawah Seksyen 221(a) Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

While the first disciplinary charge was in the following words:

> Bahawa anda Koperal RF/163043 Mohd Nadzri bin Azhari, sebagai penjawat awam dalam Pasukan Polis Diraja Malaysia yang *ketika itu bertugas sebagai Koperal Balai Polis Komuniti Queensbay (3), Lokap Balai Polis Bayan Baru, Ibu Pejabat Polis Daerah Barat Daya, Pulau Pinang didapati ingkar perintah kerana pada 09.07.2017 antara jam 0001hrs hingga 0200hrs telah bersubahat dengan Koperal RF/152203 Selvanathan a/l Copusamy mengeluarkan tiga (3) OKT iaitu Mohd Affinde bin Jaafar K/P: 721117-02-5931, Thurairaj a/l Krishnan KP: 790822-07-5001 dan Anuar bin Ayat KP: 741116-07-5011 dari bilik kurungan Lokap Berpusat Bayan Baru, Ibu Pejabat Polis Daerah Barat Daya, Pulau Pinang tanpa kebenaran Ketua Polis Daerah atau Ketua Polis Balai* yang mana bertentangan dengan Para 29 — Prosedur Tetap Operasi (SOP) Pengurusan Lokap PDRM, rujukan KPN (PR)63/4 bertarikh 01 Julai 2014. Perbuatan anda itu boleh diertikan sebagai ingkar perintah dan telah melanggar Tatakelakuan di bawah Peraturan 4(2)(i) Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) 1993 seperti berikut:
>
> > Per 4(2) Seseorang pegawai tidak boleh (i) Ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

[37] Section 221(a) of the Penal Code makes it an offence for a public servant who is legally bound to apprehend or to keep in confinement any person intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished with imprisonment for a term which may extend to seven years. However, the first disciplinary charge is taking out suspects confined in the lockup without the permission of the Officer in Charge Police District or Officer in Charge Police Station in breach of standing orders ie para 29 concerning lockup management. The second disciplinary charge is leaving the place of duty in contravention of para 8.1.10 — Inspector General of Police Standing Orders A110. Both breaches are acts of insubordination which amounts to disciplinary offences.

[38] I found that both the first disciplinary charge has satisfied the conditions of reg 30 read with reg 31. The disciplinary charges are therefore valid and lawful as it is on a different ground altogether that arose out of the applicant's conduct in the performance of his duties. The disciplinary charge also satisfies the alternative ground ie that the disciplinary charge does not raise substantially the same issues as those in the criminal proceedings. For the above reasons, I held that the disciplinary charges were in accordance with the law and not tainted with *illegality*.

[39] I also found that art 7(2) of the Federal Constitution was not contravened as alleged. The article provides as follows:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

[40] The applicant has not been acquitted of any offence at the magistrate's court where he was charged. The meaning of 'acquitted' which includes a DNAA provided in reg 28 does not apply to the word 'acquitted' in art 7(2) of the Federal Constitution. I accordingly held that the submission was without merit.

Condonation and failure to consider the written representations

[41] The submissions by the applicant concerning grounds of review (e) and (f) also overlap with one another and is also best be taken together. The first is condonation. The governing principles are laid down by the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1 where it was established as follows:

A [39] On the question of condonation raised by the respondent and referring to the case of *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form ie
B by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action ...

[42] There is no condonation in the instant case towards the applicant's act of insubordination either in the active or passive form. There is no evidence to
C show that the applicant was pardoned from the disciplinary charges. All that happened was that the applicant was told to rejoin duty in view of the DNAA as required by sub-reg 28(7) read with sub-reg 28(11).

D **[43]** On the other hand, the evidence showed that the interdiction order was maintained even after the DNAA in the criminal proceedings. This was the period investigations were being carried out by Jabatan Integriti dan Pematuhan Standard and thereafter deliberations by the disciplinary authority whether to issue a show cause or not on the misconduct of insubordination.
E The decision was eventually made and a show cause letter was issued to the applicant. These facts show that the applicant was not forgiven for the criminal charge and/or the disciplinary charges. The allegation of condonation is therefore without any basis and devoid of merit.

F **[44]** The allegation of the discipline authority failing to consider the written representations of the applicant which amounted to a denial of natural justice and a breach of the 'Wednesbury unreasonablness' principles is misconceived. The only reason this complaint was made was because the discipline authority did not accept the applicant's defence. This allegation was refuted by the
G discipline authority which said that the authority had considered the written representations. The applicant's allegation was a bare denial.

[45] In disciplinary proceedings concerning public officers, the law was succinctly laid down by the Federal Court in *Kerajaan Malaysia & Ors v Tay*
H *Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577 in the following passage:

[33] An initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D) [now the 1993 Regulations]. Disciplinary action is a process for
I dealing with job-related behaviour that does not meet the code of conduct of officers in the public service. A departmental disciplinary action is concerned not with criminal offence but with misconduct. Departmental authorities have no power to punish an employee on a criminal charge, although such authorities may penalise an employee for his misconduct on identical facts. On the facts of the instant appeal, the defendants were basically doing that, ie, the five disciplinary

offences were in relation to misconduct involving corrupt practices. It must also be remembered that the proceedings before the disciplinary authority were not criminal proceedings.

[34] The right to punish a citizen for crime is vested in the state whereas the right to penalise an employee for misconduct is in the employer because of the existence of relationship of master and servant and also because the General Orders so provide where public employees are concerned. Thus, an initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D).

[36] *The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts.* Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision-making proceedings leading to the public officer's dismissal.

(Followed by the Court of Appeal in *Dato' Seri Hj Mustafar bin Hj Ali (Chairman of the Disciplinary Board for the Support Group (No 1), Immigration Department of Malaysia, Putrajaya) & Ors v Yuganthiran a/l Guinda Rajoo* [2023] 2 MLJ 255; [2023] 3 CLJ 693; *Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor* [2021] 6 MLJ 750; [2021] 10 CLJ 737; and *Dato' Seri Hj Mustafar bin Hj Ali (Chairman of the Disciplinary Board for the Support Group (No 1), Immigration Department of Malaysia, Putrajaya) & Ors v Yuganthiran a/l Guinda Rajoo* [2023] 2 MLJ 255; [2023] 3 CLJ 693.)

[46] Thus, the court exercising the power of review in this genre of cases has limited power and will intervene where there was a fundamental procedural flaw. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the Legislature has entrusted the responsibility of deciding the issue and not the courts.

[47] I found that from the evidence, the disciplinary authority had exercised its function and it is not for this court to come to a different conclusion of the same facts. I have considered the affidavits carefully and there is no reason for me to interfere with the decision of the disciplinary authority.

The interdiction order was in beach of reg 43(1)

[48] The interdiction order was made under s 78 of the Police Act 1967 read with reg 44 of the 1993 Regulations. The regulations allow interdiction from the time an officer is arrested where criminal proceedings have been instituted against such officer and such date as may be determined by the disciplinary authority, where disciplinary proceedings with a view that a punishment of dismissal or reduction in rank be imposed has been instituted against the officer.

[49] In any event, the issue of interdiction has effect on an officer's emoluments and allowances pending the disposal of criminal charges and/or the disciplinary charges. If the officer has been convicted of the criminal charge or dismissed from service he shall not be entitled to any part of the emoluments which has not been paid to him during the period of his interdiction. The officer has in the instant case been dismissed from service. The complaint is without merit.

The second, third, fourth, and fifth disciplinary charges

[50] These four charges concerns, the failure to make a declaration of acquisition of property to the head of department after acquiring the same which failure is a disciplinary offence under sub-reg 10(3) which provides as follows:

> Where, after making a declaration under subregulation (1), an officer or his spouse or child acquires any property, either directly or indirectly, or any property acquired by him or by his spouse or child is disposed of, that officer shall immediately declare such acquisition or disposal of property to his Head of Department.

[51] The acquisition of property were vehicles. The only complaint made by the applicant was the failure of the disciplinary authority to consider that no limitation of time was stipulated for an officer to declare any acquisition of property under the subregulation. The word 'immediately' in the sub-reg 10(3) would mean as soon as possible and on the facts was not the case.

[52] The applicant was rightly found guilty of the second, third, fourth, and fifth disciplinary charges and there were no reasons for this court to interfere with the decision after reviewing the decision for process and substance. In any event, the punishment was a mere 'warning' which is the most lenient of the punishment stipulated in reg 38. The complaint is therefore without merit.

CONCLUSION

[53] For the above reasons, the application was dismissed.

Judicial review application dismissed.

Reported by Ashok Kumar